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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ISRAEL RIVERA et al., Defendants and Appellants.	B210734 (Los Angeles County Super. Ct. No. BA322608)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael E. Pastor, Judge. Modified with directions and, as so modified, affirmed.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant Israel Rivera.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant Edwin Gutierrez.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Israel Rivera and Edwin Gutierrez appeal their convictions for kidnapping and false imprisonment, and Gutierrez's conviction for assault with a deadly weapon. Rivera and Gutierrez were sentenced to prison terms of 19 and 22 years, respectively.

Gutierrez contends the evidence was insufficient to support his conviction for kidnapping. Both appellants urge that their convictions must be reversed because the trial court committed instructional errors, improperly admitted evidence, and erred by denying their mistrial motions based on the prosecutor's discovery violation. Appellants also contend their presentence custody credits were incorrectly calculated. We modify appellants' custody credits as requested. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's evidence.*

Walter Zelaya lived in a Los Angeles apartment located at 321 South Hobart with his cousin Elcan Ochoa, his nephew Maber Rivera,[1] and Alex Gabino. Zelaya socialized with appellants Rivera and Gutierrez at nightclubs and parties. Maber sometimes joined them. Zelaya also knew Esmeralda Ponce, who was Gutierrez's girlfriend.

On the evening of April 9, 2007, Zelaya was in his bedroom at the apartment; Ochoa and Gabino were in the living room. Maber had gone to the grocery store. At approximately 10:30 p.m., Maber returned from the store and saw Gutierrez's truck parked in front of the apartment and Gutierrez standing outside. Maber exchanged pleasantries with Gutierrez. Gutierrez asked whether Zelaya was at home. Maber responded affirmatively, opened the apartment building's outer door, and let Gutierrez in. As Maber opened the door to the apartment, appellant Rivera and a man named Boricua entered also. Gutierrez turned to Maber and warned him not to " 'let anyone get involved' " because " '[t]his [was] between' " him and Zelaya. Inside the apartment,

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[1] For ease of reference, Maber Rivera will be referred to by his first name. Maber is unrelated to appellant Israel Rivera.

Rivera pointed a gun at Maber, Gabino, and Ochoa, told them to sit down, and warned them not to get involved or they would be killed. Rivera stated that Zelaya had " 'messed up.' "

Gutierrez, who was dressed in black clothing and gloves, and Boricua went into Zelaya's bedroom. Gutierrez told Zelaya he was "going to pay for everything that had happened." Zelaya believed Gutierrez was referring to conversations Zelaya had had with a mutual acquaintance named Sara. Gutierrez pulled a baseball bat from his back waistband area. Boricua threw a baseball at Zelaya, striking Zelaya in the forehead. Gutierrez repeatedly struck Zelaya with the bat. Boricua hit him with his fists, and then with Zelaya's three-foot tall soccer trophies, causing at least two of them to break. Zelaya screamed for help, told the assailants to stop, and protested that they were going to kill him. In the living room, Maber asked Rivera why he did not tell the others to stop hitting Zelaya. Rivera reiterated, " 'He screwed up.' "

After approximately 20 minutes, Gutierrez pulled out a gun and announced that they were taking Zelaya to see Ponce. Gutierrez forced Zelaya into the living room, where Rivera was still holding Ochoa, Maber, and Gabino at gunpoint. In the living room, Boricua began hitting Zelaya again.

Zelaya's next door neighbor, who had been disturbed by the screams and noises emanating from Zelaya's apartment, contacted the manager. The manager knocked on Zelaya's door, which Boricua partially opened. The manager asked whether Zelaya was "okay." Zelaya nodded affirmatively, and Boricua told him Zelaya was busy. The manager left.

Rivera and Gutierrez, both holding guns, threatened to return and kill Ochoa, Maber, and Gabino if they contacted police. Maber pleaded with Gutierrez not to harm Zelaya, and Gutierrez told him nothing would happen as long as Maber and the others did not call the police. Gutierrez took Ochoa's cellular telephone. Rivera left the apartment, saying he was going to get the truck. Gutierrez and Boricua then forced Zelaya from the apartment into the truck at gunpoint. During the drive to Ponce's residence, Gutierrez kept his gun in his hand and Boricua held a bat pointed toward Zelaya's face. Gutierrez

forced Zelaya to call Ochoa and tell him that, if Ochoa called police, Zelaya would be killed.

Rivera then drove to Ponce's residence at 127 West 71st Street, in Los Angeles. The drive took approximately 15 minutes. Gutierrez told Zelaya that when they arrived, Zelaya was to tell Ponce that Gutierrez had been faithful to Ponce and had had nothing to do with Sara. During the drive, all three men threatened to kill Zelaya if he did not do as he was told or if police were contacted. Zelaya, who was frightened, told them he would do whatever they wanted him to.

When the group arrived at Ponce's house, Gutierrez telephoned her and she came outside. The men exited the car and surrounded Zelaya. Both Rivera and Gutierrez had guns in their hands. As instructed, Zelaya told Ponce that Gutierrez had had nothing to do with Sara and "it was all a lie." When Zelaya finished speaking, Gutierrez said, " 'Get this faggot. Get this fucking faggot.' " Rivera and Boricua began hitting Zelaya again.

Ponce's mother exited the house and told them to stop beating Zelaya, or they would kill him. She threatened to call police if they did not leave him alone.

The group departed in the truck, with Rivera still driving. They dropped Zelaya at a spot approximately six or seven blocks from his apartment, about a 15-minute drive from Ponce's residence. Gutierrez stated: " 'I hope everything you told Esmeralda works out fine. Otherwise, I'm going to kill you.' " Boricua, Rivera, and Gutierrez again threatened to kill him. Rivera placed his gun against Zelaya's left temple and told him, " 'Be careful. Don't even try to call the police, or I'm going to kill you.' " Gutierrez returned Zelaya's and Ochoa's cellular telephones, and appellants drove away.

Zelaya telephoned Maber, who drove him back to his apartment. Zelaya was "all beaten up." His shirt was bloody, and he had bruises and swelling on his face and back and bumps on his head. Zelaya did not call police because he was afraid appellants and Boricua would carry through on their threats to kill him or his family.

Zelaya found it difficult to work the next day because he was so weak from his injuries and could not "see right." Two days after the attack he was seen at a hospital emergency room. The emergency room physician refused to treat Zelaya unless the

police were notified. Zelaya was reluctant, but spoke to police after they were summoned by hospital personnel.

b. *Defendants' evidence.*

Ponce testified that Zelaya had flirted with her when she saw him at nightclubs. Zelaya had said "bad things" about Gutierrez, told Ponce that Gutierrez had had relationships with other girls, and stated that Gutierrez was not the "right guy" for her. Sara had telephoned Ponce and told her she was dating Gutierrez. Sara said she had obtained Ponce's number from Zelaya. Ponce and her mother both denied that Gutierrez and Rivera had brought Zelaya to Ponce's home or beaten him up on the night of April 9, 2007.

Rivera, testifying in his own behalf, explained that he, Gutierrez, and Boricua went to Gutierrez's apartment on the night of April 9, 2007, because Gutierrez wanted to talk to Zelaya about Ponce. Rivera remained in the living room while Zelaya and Gutierrez talked in Zelaya's bedroom. Rivera heard them arguing. He saw Zelaya punch Gutierrez in the face, and the two men then engaged in mutual combat. Boricua attempted to break up the fight, and Zelaya socked him in the face. Neither Boricua nor Gutierrez had weapons. Within a minute after the manager's visit to the apartment, Rivera went to get the truck. Boricua and Gutierrez followed approximately five minutes later. The group drove away. Gutierrez dropped Boricua and Rivera off at their respective residences; they did not visit Ponce's residence. At no time did any of the men have a bat or a gun. Neither Rivera nor the others made any threats to Zelaya, Ochoa, Maber, or Gabino.

2. *Procedure.*

Rivera and Gutierrez were tried together by a jury. Rivera was convicted of kidnapping (Pen. Code, § 207, subd. (a))[2] and three counts of false imprisonment by violence or menace (§ 236). The jury further found that Rivera personally used a firearm

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[2] All further undesignated statutory references are to the Penal Code.

in the commission of the crimes. (§§ 12022.53, subd. (b), 12022.5, subd. (a).) In a bifurcated proceeding, the trial court found Rivera had served a prior prison term within the meaning of section 667.5, subdivision (b). A motion for a new trial, filed by Gutierrez and joined by Rivera, was denied. The trial court sentenced Rivera to a term of 19 years in prison. It imposed a restitution fine, a suspended parole restitution fine, a state construction fine, and a court security assessment.

Gutierrez was convicted of kidnapping (§ 207, subd. (a)), assault with a deadly weapon other than a firearm (§ 245, subd. (a)(1)), and three counts of false imprisonment by violence or menace (§ 236). The jury further found that Gutierrez personally used a firearm in the commission of the kidnapping (§ 12022.53, subd. (b)) and false imprisonment counts (§ 12022.5, subd. (a)). The trial court sentenced Gutierrez to a term of 22 years in prison. It imposed a restitution fine, a suspended parole restitution fine, a state construction fine, and a court security assessment.

Rivera and Gutierrez appeal.

DISCUSSION

1. *The evidence was sufficient to support Gutierrez's conviction for kidnapping.*

Pointing to a variety of purported inconsistencies and weaknesses in the People's case, Gutierrez urges that the evidence was insufficient to support his conviction for kidnapping. He posits that the "extent and nature of the inconsistencies in the testimony of the key prosecution witnesses was so pervasive . . . as to render that evidence insufficiently substantial to support the verdict." This contention lacks merit.

When determining whether the evidence was sufficient to sustain a criminal conviction, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66; *People v. Halvorsen* (2007) 42 Cal.4th 379, 419; *People v. Carter* (2005) 36 Cal.4th 1215, 1257-1258.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina*

(2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

To prove a defendant is guilty of kidnapping, the People must establish that "(1) the defendant took, held, or detained another person by using force or by instilling reasonable fear; (2) using that force or fear, the defendant moved the other person, or made the other person move a substantial distance; and (3) the other person did not consent to the movement." (*People v. Burney* (2009) 47 Cal.4th 203, 232; § 207, subd. (a).) " ' "[S]ubstantial" means a "significant amount" as contrasted with a distance that is "trivial . . . ." ' [Citation.]" (*People v. Burney*, *supra*, at p. 233, fn. 8; *People v. Morgan* (2007) 42 Cal.4th 593, 606-607.)

Here, Zelaya's testimony, by itself, provided ample evidence to support the jury's verdict. It is well settled that the testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to prove a disputed fact. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Hampton* (1999) 73 Cal.App.4th 710, 722; *People v. Vega* (1995) 33 Cal.App.4th 706, 711.) Zelaya testified that, after appellants entered his bedroom and beat him, they forced him into Gutierrez's truck at gunpoint and drove him to Ponce's residence, where he was required to assure Ponce that Gutierrez had been faithful to her. Rivera and Gutierrez were armed with guns; Gutierrez was also armed with a baseball bat. Zelaya was outnumbered by the three assailants, who accosted him in a manner ensuring he was vulnerable. Zelaya's account was corroborated in many respects by Maber and Ochoa. The foregoing evidence was more than enough to establish appellants took Zelaya by means of force and fear, and that Zelaya did not consent to the movement.

The evidence was also sufficient to establish Zelaya was moved a substantial distance. Zelaya was driven from his residence at 321 South Hobart in Los Angeles to Ponce's residence at 127 West 71st Street, also in Los Angeles. The drive took approximately 15 minutes. We take judicial notice of the fact that the distance between

the two points was over 10 miles. (Evid. Code, § 452, subd. (h); see generally *People v. Zaring* (1992) 8 Cal.App.4th 362, 379, fn. 4.) Appellants then drove Zelaya back from Ponce's house to a point within a few blocks of Zelaya's apartment. This was, under any reasonable interpretation of the evidence, a substantial distance. (See *People v. Burney, supra,* 47 Cal.4th at p. 233, fn. 8.) In short, Zelaya's testimony, corroborated in many respects by Maber's and Ochoa's testimony, fully established all elements of the offense.

Gutierrez, however, points to a variety of purported inconsistencies in the evidence, and contends that the testimony of Zelaya, Ochoa, and Maber was "so conflicting and inconsistent" that no reasonable trier of fact could have found it to be of solid value.[3] He also points out that Zelaya had a motive to lie, i.e., his and Gutierrez's mutual interest in Sara. He further notes that Zelaya's testimony was contradicted by defense witnesses.

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[3] Gutierrez argues that Zelaya contradicted himself at various points in the investigation and proceedings regarding: (1) whether he was sleeping or watching television when Gutierrez and Boricua entered his room; (2) how many times appellants and Boricua hit him; (3) whether Rivera's gun was shiny or not; (4) whether Boricua or Rivera opened the door for the manager, and whether the manager actually saw Zelaya in the room; (5) the seating arrangement in the truck on the drive to Ponce's house; (6) whether Rivera, or Rivera and Boricua, beat him at Ponce's house; (7) whether Gutierrez said "Kill that motherfucker" or " 'Get this faggot' " while in front of Ponce's house; (8) whether Gutierrez made one or two telephone calls to Ponce; and (9) whether Zelaya walked home or was picked up by a relative after he was dropped off by appellants a few blocks from his apartment. Gutierrez further contends Ochoa contradicted himself at various points in the investigation and proceedings regarding whether Gutierrez had the bat and gun in his hands when he emerged from Zelaya's bedroom; whether Ochoa could see Gabino and Maber while lying on the sofa bed in the living room; and whether Gutierrez hit Zelaya when they were in the living room. Gutierrez also points out that a search warrant affidavit prepared by Detective Luis Corona stated that Boricua, not Rivera, held the roommates at gunpoint in the living room; that a next door neighbor testified to seeing two men, not three, leave the apartment; and that Zelaya's and Ochoa's testimony was inconsistent regarding whether appellants took the land line phone from the apartment.

Our review of the entire record establishes that the purported inconsistencies cited by Gutierrez were minor, satisfactorily explained at trial, or cannot properly be characterized as actual inconsistencies. Moreover, Gutierrez fails to recognize the fundamental principle that conflicts, inconsistencies, and discrepancies in the evidence do not amount to a lack of substantial evidence. "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young, supra,* 34 Cal.4th at p. 1181; see also *People v. Maury* (2003) 30 Cal.4th 342, 403 ["Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts"].)

Here, none of the purported evidentiary problems cited by Gutierrez comes close to demonstrating the evidence was impossible or inherently improbable. To the contrary, the prosecution witnesses' accounts were consistent in all significant respects. The alleged inconsistencies in the evidence were fully argued to the jury by defense counsel, and it was the jury's role, not this court's, to resolve any evidentiary discrepancies. Gutierrez's request amounts to nothing more than a request that we reweigh the evidence on appeal. As explained, this is not the function of an appellate court. (*People v. Young, supra*, 34 Cal.4th at p. 1181; *People v. Maury, supra*, 30 Cal.4th at p. 403; *People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139.) The evidence was sufficient.

2. *Alleged instructional errors.*

a. *Kidnapping instruction.*

The trial court instructed the jury on the elements of kidnapping with CALJIC No. 9.50. That instruction provided, in pertinent part: "Every person who, unlawfully with physical force or by any other means of instilling fear, takes, holds, or detains another person and carries that person without his consent or compels another person without his consent and because of a reasonable apprehension of harm to move for a

distance that is substantial in character, is guilty of the crime of kidnapping in violation of Penal Code section 207(a). [¶] A movement that is only for a slight or trivial distance is not substantial in character. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person was (a) moved by the use of physical force or by any other means of instilling fear, or (b) compelled by another person to move because of a reasonable apprehension of harm; [¶] 2. The movement of the other person was without his consent; and [¶] 3. The movement of the other person in distance was substantial in character."

During a bench conference regarding the instructions, the trial court asked whether the parties wished the court to include an additional portion of the standard instruction that read: "In determining whether a distance that is more than slight or trivial is substantial in character, you should consider the totality of the circumstances attending the movement, including, but not limited to, the actual distance moved, or whether the movement increased the risk of harm above that which existed prior to the movement, or decreased the likelihood of detection, or increased both the danger inherent in a victim's foreseeable attempt to escape and the attacker's enhanced opportunity to commit additional crimes." Both defense counsel stated they did not wish to have the jury instructed with the additional portion. Counsel for Rivera stated: "I think the rest of it just confuses." Counsel for Gutierrez agreed.

Appellants now contend that the jury should have been given the omitted portion, and the error requires reversal. We disagree.

"A trial court must instruct the jury, even without a request, on all general principles of law that are ' "closely and openly connected to the facts and that are necessary for the jury's understanding of the case." [Citation.]' " (*People v. Burney, supra,* 47 Cal.4th at p. 246.) *People v. Martinez* (1999) 20 Cal.4th 225, 235-236, held that factors other than the actual distance a victim is moved are relevant to the jury's determination of the asportation element of simple kidnapping. The court explained: "In cases involving simple kidnapping, the instructions currently provide that the victim must have been moved 'for a substantial distance, that is, a distance more than slight or trivial.'

(See CALJIC No. 9.50.) . . . [I]t would also be proper for the court to instruct that, in determining whether the movement is ' "substantial in character" ' [citation], the jury should consider the totality of the circumstances. Thus, in a case where the evidence permitted, the jury might properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes." (*People v. Martinez, supra,* at p. 237; see also *People v. Morgan, supra,* 42 Cal.4th at p. 610.) "To permit consideration of 'the totality of the circumstances' is intended simply to direct attention to the evidence presented in the case, rather than to abstract concepts of distance." (*People v. Martinez, supra,* at p. 237.) "[C]ontextual factors," however, do not suffice to establish the asportation element if the movement is only a "very short distance." (*Ibid.*)

The omitted portion of the instruction was therefore a correct statement of law. (*People v. Martinez, supra,* 20 Cal.4th at p. 237.) However, as the People correctly point out, any error of omission was invited. The invited error doctrine bars a defendant from challenging an instruction given by the trial court when the defendant has made a " 'conscious and deliberate tactical choice' " to request the instruction. (See, e.g., *People v. Harris* (2008) 43 Cal.4th 1269, 1293; *People v. Weaver* (2001) 26 Cal.4th 876, 970; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1134.) For the doctrine to apply, it must be clear from the record "that counsel had a deliberate tactical purpose in suggesting or acceding to an instruction, and did not act simply out of ignorance or mistake." (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127.)

Such was the case here. Both defense counsel informed the court they did not wish the omitted portion of the instruction to be given because they felt it would confuse the jury. There was no genuine dispute that, if events transpired as described by Zelaya, the asportation element was satisfied. Indeed, neither defense counsel made such an argument to the jury. The omitted portion of the instruction would not have been helpful to the defense, in that consideration of the totality of the circumstances was unlikely to

benefit appellants. Removing Zelaya from his apartment and roommates, and placing him in a vehicle controlled by appellants, clearly increased the risk of harm to him and decreased the likelihood appellants would be detected. The record therefore suggests defense counsel made an informed tactical decision and any error in the instruction was invited. Contrary to appellants' suggestion, counsel did not merely acquiesce in an error initiated by the trial court. Fairly read, the record shows the trial court initiated discussion of the issue, asked the parties for their views, and instructed in accordance with their wishes.

Moreover, even assuming arguendo that the trial court committed uninvited error, it was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 837.) The trial court instructed on all elements of the offense. The omission did not result in misdescription of the elements of the offense, as appellants argue; at worst, it left ambiguity regarding what constituted substantial movement. When reviewing a purportedly ambiguous jury instruction, we examine the challenged language to inquire whether there is a reasonable likelihood the instruction caused the jury to misconstrue or misapply the law. (*People v. Thornton* (2007) 41 Cal.4th 391, 436; *People v. Richardson* (2008) 43 Cal.4th 959, 1028; *People v. Crew* (2003) 31 Cal.4th 822, 848.) "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is ' "whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process." ' " (*Middleton v. McNeil* (2004) 541 U.S. 433, 437.)

Here, no reasonable jury was likely to misapply the law as a result of the omission. Indeed, inclusion of the omitted language would not have aided the defense. As we have explained, if the jury believed appellant's evidence, there was no asportation at all; instead, the men simply engaged in a fistfight, started by Zelaya, at the apartment. If the jury credited Zelaya's account of the incident, the actual distance moved—a 30-minute drive—was necessarily significant and substantial. An instruction to view the totality of the circumstances would have tended to support, not undercut, this conclusion.

Appellants try to avoid this result by arguing that there were four "segments" of Zelaya's asportation, i.e., removing him from his bedroom at gunpoint; removing him from the apartment and to Gutierrez's truck at gunpoint; transporting him in the truck to Ponce's residence; and driving him to a point several blocks from his house. They posit that the jury might have credited only selective portions of Zelaya's testimony and concluded he was forcibly removed from his bedroom, but not driven anywhere in Gutierrez's vehicle. It is highly unlikely a reasonable jury would have viewed the evidence in this fashion. The record provides no basis upon which a reasonable jury could have concluded Zelaya was accosted and beaten by the armed appellants, but only moved from the bedroom to the living room, or to the truck but no further.

Moreover, even if the jury *had* come to such a conclusion, the omitted language would not have assisted appellants. Assuming for purposes of argument that jurors believed appellants came to Zelaya's apartment and beat him, but moved him only from the bedroom to the living room, they could not reasonably have found this distance—only a few feet—was substantial in character. Omission of the "totality of the circumstances" portion of the instruction could have had no bearing on this conclusion. If jurors believed Zelaya was forcibly moved to the truck, but no further, the omitted portion of the instruction would not have assisted the defense. Reasonable jurors would likely have concluded that the movement of Zelaya to the truck by three armed men, away from his roommates and other apartment residents, where he was completely in the assailants' control, increased the risk of harm to him and enhanced the assailants' ability to commit additional crimes. Thus, consideration of the totality of the circumstances would not have assisted the defense.

For the same reason, there is no merit to appellants' contention that counsel was ineffective for failing to request the omitted paragraph. A meritorious claim of constitutionally ineffective assistance must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. If the defendant makes an insufficient showing on either

component, the ineffective assistance claim fails. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Lopez* (2008) 42 Cal.4th 960, 966; *People v. Carter* (2003) 30 Cal.4th 1166, 1211.) As we have explained, there was a reasonable, tactical basis for counsel's actions, and in any event omission of the language could not have disadvantaged the defense.

b. *Conspiracy instruction.*

(i) *Additional facts.*

The trial court indicated to the parties that it believed it was required to instruct on conspiracy. The prosecutor agreed, arguing that the jury could infer Gutierrez, Rivera and Boricua went to Zelaya's apartment planning to beat and kidnap him. Rivera's counsel disagreed, arguing that the men could have gone to the apartment merely to confront and talk to Zelaya, and that the kidnap was an afterthought. He also pointed out that the men had not been charged with conspiracy. Gutierrez's counsel likewise argued that there was no evidence of statements by appellants demonstrating a conspiracy. The trial court concluded that the evidence was sufficient to establish the existence of a conspiracy.

Accordingly, the court gave a series of instructions regarding criminal conspiracy, i.e., CALJIC Nos. 6.10.5, 6.11, 6.12, 6.13, 6.16 through 6.19, 6.21, 6.22, and 6.24. As particularly relevant to appellants' argument, CALJIC No. 6.10.5 provided in pertinent part: "A conspiracy is an agreement between two or more persons with the specific intent to agree to commit the crime of kidnapping, and with the further specific intent to commit that crime, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime but is not charged as such in this case." CALJIC No. 6.11 provided: "Each member of a criminal conspiracy is liable for each act and bound by each statement of every other member of the conspiracy if that act or statement is in furtherance of the object of the conspiracy. [¶] The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators."

During argument, the prosecutor urged that, if the jury found appellants were part of a conspiracy to kidnap Zelaya, the acts and statements of one were attributable to the others, as long as the acts and statements were made in furtherance of the conspiracy.

(ii) *Discussion.*

Appellants contend the instructions on conspiracy were improper because there was a lack of substantial evidence to show the men had conspired to kidnap Zelaya. They urge that, while the jury could infer they went to Zelaya's apartment with the plan to beat him, there was no evidence of a conspiracy to kidnap him. They assert that the conspiracy instructions lightened the prosecution's burden of proof by allowing conviction on a factually insufficient vicarious liability theory. We disagree.

"It is firmly established that evidence of conspiracy may be admitted even if the defendant is not charged with the crime of conspiracy. [Citations.] Once there is proof of the existence of the conspiracy there is no error in instructing the jury on the law of conspiracy." (*People v. Rodrigues, supra,* 8 Cal.4th at p. 1134.) To determine whether there was sufficient proof to support instructions on conspiracy, we apply the following principles. A criminal conspiracy exists when the defendant and one or more persons specifically intended to agree to commit an offense, intended to commit all elements of the offense, and undertook an overt act in furtherance of the agreement. (§ 182, subd. (a)(1); *People v. Swain* (1996) 12 Cal.4th 593, 600; *People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399; *People v. Morante* (1999) 20 Cal.4th 403, 416; *People v. Herrera* (2000) 83 Cal.App.4th 46, 64.) These facts may be established by circumstantial evidence. (*People v. Herrera, supra,* at p. 64.) Proof of an express or formal agreement is not required. (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1606, disapproved on another point in *People v. Palmer* (2001) 24 Cal.4th 856, 861, 867.) It is "not necessary to demonstrate that the parties met and actually agreed to undertake the unlawful act or that they had previously arranged a detailed plan. The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. Therefore, conspiracy may be proved through circumstantial evidence inferred from the conduct, relationship, interests, and activities of the alleged conspirators

before and during the alleged conspiracy." (*People v. Prevost, supra,* at p. 1399; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1135; *People v. Gonzalez* (2004) 116 Cal.App.4th 1405, 1417, disapproved on other grounds in *People v. Arias* (2008) 45 Cal.4th 169, 182; *People v. Herrera, supra,* at p. 64.) " ' "The general test is whether there was 'one overall agreement' to perform various functions to achieve the objectives of the conspiracy. . . ." [Citation.]' [Citation.]" (*People v. Gonzalez, supra,* at p. 1417.)

The evidence here was sufficient to support the conspiracy instructions. The evidence strongly suggested appellants were operating according to a prearranged plan. When Rivera, Gutierrez, and Boricua arrived at Zelaya's apartment, Rivera and Boricua did not show themselves at the door until Maber opened it, allowing them to surprise the occupants. Gutierrez immediately told Maber that there was a dispute between him and Zelaya. Immediately upon entering the apartment, Rivera held Maber, Ochoa, and Gabino at gunpoint, while the other two assailants went straight to Zelaya's room. Rivera and Gutierrez were already armed with guns when they arrived, and Gutierrez and Boricua brought a baseball and a baseball bat to the apartment. Gutierrez was wearing gloves. While Gutierrez and Boricua attacked Zelaya in his bedroom, Rivera kept his gun on Maber, Ochoa, and Gabino, preventing them from going to Zelaya's assistance. The jury could readily infer that these rapid, concerted actions were the result of a prearranged agreement. Furthermore, Rivera, while in the living room, told Maber, Ochoa, and Gabino that Zelaya had "messed up" and they should not get involved. While in Zelaya's bedroom, Gutierrez and Boricua told Zelaya that he was going to "pay" for "everything that had happened." Thus, all three assailants clearly knew, and had agreed to, the purpose of the visit before arriving: to punish Zelaya for his supposed transgressions regarding Ponce and Sara.

The jury could likewise infer the men were acting in concert, according to a prearranged agreement, when they moved Zelaya from the apartment to the truck and drove him to Ponce's apartment. Without being instructed to do so, Rivera went to get the truck while the others remained in the apartment. Rivera drove, while Gutierrez and Boricua guarded Zelaya. Rivera did not ask for further instructions or directions to

Ponce's residence. Gutierrez told Zelaya what he should say to Ponce when they arrived at the apartment. Boricua and Rivera chimed in, warning Zelaya not to do anything funny. Neither Boricua nor appellants expressed surprise or hesitation during these events, as one would expect if driving Zelaya to Ponce's house had been unexpected, nor did they ask for clarification about what was about to transpire or discuss what action to take next. Instead, the three men continued their seemingly coordinated actions throughout the evening. (See generally *People v. Rodrigues, supra*, 8 Cal.4th at pp. 1134 -1135.) The most logical and readily inferable conclusion from the evidence was that the men had preplanned the entire course of conduct, and had agreed to commit not only the assault, but also the kidnapping. Substantial evidence supported the conspiracy instructions, and appellants were not convicted on a factually insufficient theory.

3. *The trial court did not prejudicially err by admitting evidence regarding Zelaya's fear of appellants.*

a. *Additional facts.*

During direct examination, Zelaya testified that he did not call police after the incident, and reluctantly spoke to police only after a physician refused to treat him. The prosecutor elicited that Zelaya had been afraid appellants would kill him or his family if he contacted police. During cross-examination, Gutierrez's counsel questioned Zelaya regarding his fear of appellants. On redirect, over a defense relevance objection, Zelaya testified that he had moved out of his residence a few weeks after the attack. He explained the move was occasioned by "Fear, fear. I don't really know these people. I don't know if they were going to come back or they were going to send someone else to get me. I didn't know what was going to happen." Shortly thereafter, the prosecutor queried, "[Y]ou indicated in cross-examination that you don't want to be here?" Zelaya replied, "Yeah. What I really want is to get this over with. I want to go back to my life. I want nothing to do with those people. I'm not the same person. Now I am fearful. I cannot sleep. [¶] When I'm at work and thinking that maybe they are going to come at

work and get me, I don't feel safe anywhere now." Zelaya also testified that at the preliminary hearing, he had been nervous and scared.

b. *Discussion.*

Appellants assert that evidence Zelaya was afraid of them *after* he spoke to police was irrelevant to the issues at trial, and admission of the testimony violated their due process rights. According to appellants, the challenged evidence allowed the jury "to convict . . . not based upon proffered evidence relevant to whether [they] kidnapped Zelaya or falsely imprisoned Zelaya's roommates, but rather based upon the fact that [they were] dangerous and scary person[s]."

We are unpersuaded. Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the witness's credibility, and is therefore admissible subject to the trial court's discretion. (*People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Sapp* (2003) 31 Cal.4th 240, 301; see generally Evid. Code, § 780.) The explanation of the basis for the witness's fear is likewise relevant to his or her credibility. (*People v. Burgener, supra,* at p. 869.) "A witness who testifies despite fear of recrimination of *any* kind by *anyone* is more credible because of his or her personal stake in the testimony. Just as the fact a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility [citation], the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility. . . . [¶] Regardless of its source, the jury would be entitled to evaluate the witness's testimony *knowing* it was given under such circumstances. And [jurors] would be entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368-1369.) The challenged evidence was therefore relevant, and its admission was not error.

But even assuming, for the sake of argument, that the evidence was admitted in error, it was manifestly harmless. The erroneous admission of evidence requires reversal only if it is reasonably probable that appellants would have obtained a more favorable result had the evidence been excluded. (Evid. Code, § 353, subd. (b); *People v. Earp*

(1999) 20 Cal.4th 826, 878; *People v. Avitia* (2005) 127 Cal.App.4th 185, 194.) Here, the jury had already heard evidence that appellants had threatened to kill Zelaya and his housemates, had pulled guns on them, had beaten Zelaya repeatedly, and had forced him into their truck against his will. The jury had also heard evidence that Zelaya and his roommates were frightened by these threats, and were so intimidated they did not immediately report the incident to police. Given the evidence of appellants' conduct and threats, it is inconceivable that the additional, unsurprising testimony that Zelaya was still afraid had any impact on the jury's verdict.

Appellants point out that, as trial was concluding, the jurors sent a written request to the court asking "not to speak to any attorneys—we wish to leave as soon as possible." From this, appellants infer that jurors had become afraid of them, a fear they attribute to Zelaya's limited testimony that he was still afraid at the time of trial. We do not believe the jurors' note can fairly be considered evidence of jurors' fear of appellants. We observe that the jurors asked to avoid speaking to *any* attorney—the prosecutor included. Moreover, voir dire had commenced on Tuesday, January 22, 2008, and the jury rendered its verdicts on the afternoon of Thursday, January 31, 2008. We believe it highly likely that the jurors' note evidenced nothing more than their understandable desire to conclude their jury service and attend to their own affairs, rather than any feelings toward appellants or counsel. In sum, the evidence was not admitted in error and, in any event, its admission was harmless.

4. *The trial court did not abuse its discretion by denying appellants' mistrial motion based on the prosecutor's inadvertent discovery violation.*

a. *Additional facts.*

During cross-examination of Zelaya, Rivera's counsel asked what happened to the broken trophies that had been used to beat him. Zelaya responded that the police had taken them and the baseball Boricua threw at his head. At the next recess, Rivera's counsel complained that he had served a discovery request on the People months earlier, but had never been informed that police were in possession of the baseball and trophies.

Had he known those items were collected by police, he would not have questioned Zelaya about their whereabouts.

The prosecutor averred that she had been unaware the trophies and baseball had been taken by police. After several discussions between the court and the parties regarding the issue, the trial court conducted a hearing to determine whether the People had committed a willful discovery violation. Detective Luis Corona testified that due to an oversight, a property report included in the case workbook, showing police took possession of the ball and trophies, was inadvertently omitted from the material given to the district attorney's office. Similarly, Detective Sergio Martinez testified that he "might have missed" the property report, but that if so, his error was inadvertent. Both officers expressed dismay about the error.

Defendants moved for a mistrial. Counsel for Rivera, joined by counsel for Gutierrez, argued that Zelaya's testimony that the items had been given to police was detrimental to the defense case. He reiterated that, had he known the police had taken the items, he would not have asked Zelaya about them. Further, counsel averred that the defense would have had the items examined for fingerprints, had they been available. The prosecutor responded that, if the defense so desired, the trophies and baseball could be made available to the defense and the detectives would arrange for expedited fingerprinting of them. Neither defense counsel took the prosecutor up on the offer.

The trial court denied the mistrial motion, concluding that "the conduct here in no way, shape or form rises to the level of justifying a mistrial." It found the omission was inadvertent and negligent, but neither purposeful nor malicious. The court opined that the trophies and baseball were "extremely important evidence" that the People would have wished to present, and thus the People, not appellants, were prejudiced by the inadvertent omission. As a sanction, the court precluded the prosecutor from eliciting testimony about the recovery or booking of the trophies and baseball, as well as

introduction of the trophies and ball themselves.[4] The court also struck Zelaya's testimony that police took the items, and admonished the jury to disregard it.

b. *Discussion.*

Defendants contend the trial court erred by refusing to declare a mistrial as the sanction for the discovery violation. They complain that Zelaya's testimony was crucial corroborating evidence that was unwittingly introduced by the defense. Had the trophies and ball been available to them earlier, appellants urge, the items could have checked for fingerprints, possibly providing exculpatory evidence. Further, jurors could not be expected to disregard Zelaya's testimony despite the court's instruction to do so. The "withholding of evidence," appellants assert, therefore infringed their rights to confront and cross-examine Zelaya and, consequently, their rights to a fair trial.

We conclude the court did not abuse its discretion in choosing an appropriate discovery sanction and denying the mistrial motion. A trial court has broad discretion to fashion a remedy for a discovery violation, and may consider a wide range of sanctions. (*People v. Ayala* (2000) 23 Cal.4th 225, 299; *People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 48; *People v. Lamb* (2006) 136 Cal.App.4th 575, 581.) We review the trial court's ruling for abuse of discretion. (*People v. Ayala, supra,* at p. 299; *People v. Lamb, supra,* at p. 581.) " '[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]' [Citation.]" (*People v. Superior Court (Meraz), supra,* at p. 48.)

A motion for mistrial should be granted "only when ' "a party's chances of receiving a fair trial have been irreparably damaged." ' " (*People v. Ayala, supra,* 23 Cal.4th at p. 282; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1029.) A mistrial should be granted " 'if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably

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[4] The prosecutor stated that, given the inadvertent omission, she would not seek to introduce evidence or elicit testimony regarding the fact officers took possession of the trophies and ball.

prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 683.) We review the court's ruling on a mistrial motion for abuse of discretion. (*People v. Ayala, supra,* at p. 282; *People v. Lewis and Oliver, supra,* at p. 1029.) " 'It is not an abuse of discretion when a trial court denies a motion for mistrial after being satisfied that no injustice has resulted or will result from the occurrences of which complaint is made.' " (*People v. Gray* (1998) 66 Cal.App.4th 973, 986.)

We discern no abuse of discretion here. The trial court's finding that the nondisclosure was inadvertent was supported by substantial evidence. Given the inculpatory nature of the physical evidence, it can be fairly assumed that, had the prosecutor known police had the trophies and baseball, she would have readily sought to present them at trial. The trial court imposed a significant sanction: exclusion of any evidence that the police collected the broken trophies and the baseball, as well as the physical evidence itself. Introduction of such evidence would have strongly benefited the People's case; it would have corroborated Zelaya's account in a case that largely turned on the credibility of the witnesses. Contrary to appellants' argument, omission of the evidence that police took the trophies and ball did not in any way infringe on their ability to cross-examine Zelaya regarding the incident or their right to effective counsel.

Moreover, appellants fail to demonstrate that their chances of receiving a fair trial were irreparably damaged. Zelaya's testimony that police took the items was brief and limited. The trial court struck the testimony and admonished the jury not to consider it. We presume jurors follow the court's instructions (*People v. Waidla* (2000) 22 Cal.4th 690, 725; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1171), and nothing in the record here suggests otherwise. There was no testimony by officers that they had taken possession of the trophies and ball, nor were the items themselves introduced into evidence.

Appellants' argument that fingerprint analysis of the trophies would have lead to exculpatory evidence is disingenuous and speculative. Although the prosecutor volunteered to arrange for expedited testing of the items, so that appellants could have the results ready to present during the defense case, neither appellant took her up on this offer. They cannot now complain that they were prejudiced because the items were not fingerprinted. In any event, the contention that fingerprinting would have yielded exculpatory evidence is speculative at best.

In sum, under these circumstances, appellants' chances of receiving a fair trial were not damaged, let alone irreparably so. The trial court did not abuse its discretion by denying the mistrial motion.

5. *Custody credits.*

Appellants argue that their custody credits were miscalculated, and the People agree. As the parties point out, appellants were arrested on May 10, 2007, and remained in custody until they were sentenced on August 5, 2008. Thus, they should have been credited for 454 days of actual custody, rather than the 447 days awarded by the trial court to Rivera and the 453 days awarded to Gutierrez. A defendant is entitled to credit for all days in custody up to and including the date of sentencing. (*People v. Smith* (1989) 211 Cal.App.3d 523, 526-527; *People v. King* (1992) 3 Cal.App.4th 882, 886; § 2900.5, subd. (a).) Conduct credits are calculated under section 4019 by dividing the number of days spent in custody by four and rounding down to the nearest whole number, then multiplying by two. (*People v. Philpot* (2004) 122 Cal.App.4th 893, 908; *People v. Guillen* (1994) 25 Cal.App.4th 756, 764.) Appellants are therefore entitled to 68 days of conduct credit. We order the judgment modified to reflect this error in calculation. (*People v. Guillen*, *supra*, at p. 764 [computational errors result in an unauthorized sentence and may be corrected on appeal]; *People v. Smith*, *supra*, at pp. 526-528.)

DISPOSITION

The judgments are modified to award 454 days of actual presentence custody credit (§ 2900.5, subd. (a)) and 68 days of conduct credit (§ 4019), for a total of 522 days credit for each appellant. The clerk of the superior court is directed to prepare amended abstracts of judgment and forward copies to the Department of Corrections. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.